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Dekan Fakultas Hukum dan Komunikasi Universitas Katolik Soegijapranata Semarang,
dengan ini memberikan tugas kepada :

N a m a : Rika Saraswati, SH. CN. M.Hum, Ph.D.

S t a t u s : Dosen Program Studi Ilmu Hukum, Fakultas Hukum dan
Komunikasi Universitas Katolik Soegijapranata Semarang

Kegiatan : The Ninth Melbourne Doctoral Forum on Legal Theory, The
Obstacles to Indonesian Women as Litigants in Divorce cases to
obtaining their Rights: Reckoning the Concern, History and
Methods of Family Law and Religious Law.

W a k t u : 23 – 24 Nopember 2016

T e m p a t : University of Melbourne Victoria 3010 Australia

Lain – lain : Harap melaksanakan tugas dengan penuh rasa tanggung
jawab, dan memberikan laporan setelah tugas selesai.

Demikian surat tugas ini diterbitkan untuk dipergunakan sebagaimana mestinya.



Semarang, 15 November 2016
Dekan

B. Danang Setianto, SH. LLM. MIL.
NPP. 058.1-1992.106

26 September 2016

Dr Rika Saraswati
Faculty of Law
Soegijapranata Catholic University
Jl. Pawiyatan Luhur IV/1
Bendan Dhuwur
Semarang, Indonesia 50234

Dear Dr Saraswati,

On behalf of the Melbourne Law School at the University of Melbourne, I am very pleased to invite you to present a paper at the ninth Melbourne Doctoral Forum on Legal Theory.

The Melbourne Doctoral Forum on Legal Theory is an annual forum that brings together research students and early career researchers from Australia and overseas to engage with the theoretical and methodological concerns of law. Your proposed paper on 'The Obstacles to Indonesian Women as Litigants in Divorce cases to obtaining their Rights: Reckoning the Concern, History and Methods of Family Law and Religious Law' will make an important contribution to the Forum. I also very much hope that you will join in the discussions across all sessions of the Forum.

As a contribution towards the costs of your travel to Melbourne, the Melbourne Law School will provide you with a bursary of \$600 (AUD). These funds will be provided to you following your attendance at the Forum.

The Melbourne Doctoral Forum on Legal Theory will be held on 23-24 November 2016 at Melbourne Law School, 185 Pelham Street, Carlton, Melbourne, Australia. More information about the Forum is available at <http://law.unimelb.edu.au/research/mdflt>.

If you have any questions please do not hesitate to contact the organisers of the Forum by email to law-mdflt@unimelb.edu.au.

I very much hope that you will be able to participate in the ninth Melbourne Doctoral Forum on Legal Theory and I look forward to welcoming you to Melbourne in November.

Yours sincerely,



Professor Michelle Foster
Associate Dean (Research)
Melbourne Law School

Indonesian Women as Divorce Litigants to Obtain Their Rights:
Evaluating the Concerns, History and Methods of Family Law and Religious Law¹

Rika Saraswati

School of Law, Faculty of Law and Communication,
Soegijapranata Catholic University, Semarang, Indonesia

Abstract

This article discusses on the experiences of a number of Indonesian women who initiated divorce from their husbands because of domestic violence issues (empirical research) and the legislation in dealing with (documentary research). The issue of marriage and divorce in Indonesia is regulated by the Marriage Act 1974 and its implementing regulations. The legislation bears witness to history, the concerns of the Indonesian feminist movement and its desire to improve the legal aspects of the position of Indonesian women within a marriage. The Act states that a wife and a husband are equal before the law. However, law ‘in action’ has resulted in negative experiences for those women who initiate divorce – their rights as female divorcees are less than those of their male counterparts. This is due to male domination which not only inhabits the home, family and economic life but is upheld by the state in both secular law and, by recognition, religious law pertaining to the family, particularly as regards separation, divorce, maintenance and custody. By evaluating and comparing the various concerns expressed and feminist histories involved, and the substance and methods of the family law and religious law, it becomes clear that the current legislation is not suited to the communities’ current level of development and Indonesian families’ circumstances and experiences. For four decades the legislation on this matter has never been amended or changed.

Keyword: Indonesian women, divorce, family law, religious law, litigant, non litigant

I. Introduction

This article examines the experience of Indonesian women as divorce litigants to obtain justice through a medium namely the rights. According to Carol Smart (1989) asserting and using rights is a feminist strategy to achieve equality with men. However, utilising one’s rights brings several problems because the rights approach oversimplifies complex power relations. For example, such a rights approach has given the accused a prior right to a particular form of trial; rights are always focused on the individual who, in this instance, must prove that her rights have been violated; and implementation may be more frequently appropriated by the powerful than by the powerless (Smart, 1989, 144-5). These problems seem to be encountered by Indonesian women when they have chosen to be litigants in divorce. Although the Indonesian legislation that deals with marriage and divorce has given rights to women and men to go to court in order to uphold their rights, law ‘in action’ seemed far from ensuring that justice is obtained by women. It is believed that such a circumstance occurs because the content of the legislation still voices ‘the rights of [a] man’ e rather than of both persons equally.

Historically, law has been made on the basis of the needs and the interests of men. In the Indonesian context, the history of legislation on marriage and divorce and other

¹ Based on a paper presented at the Ninth Melbourne Doctoral Forum on Legal Theory, Melbourne Law School, 23–24 November 2016.

legislation dealing with similar issues (broadly categorised as ‘family matters’) has demonstrated such a pattern. Although the Marriage Act 1974 has taken the interest of women as a group into account as it demands equal rights between women and men, the details of the legislative provision still demonstrate gender bias and its implementation seems to prefer the male party.

Unfortunately, some gender biased provisions in the Act have been imitated by other legislation, such as implementing regulation of the Act and Kompilasi Hukum Islam (Compilation of Islamic Law) which is implemented for those who are Muslims. The different legislation for Muslim and non-Muslim women has created some difficulties for these women demand their rights similar to each other. It is caused not only by gender biased provisions but also unclear provisions. Moreover, the judge’s interpretation on the provisions of the Act and judge’s gender perspective on women’s experiences generally and on those of the woman who has filed for divorce is also influential in terms of those women wanting to obtain their rights and justice actually doing so. As a consequence, a woman continues to face difficulties in obtaining her rights although the legislation on marriage and divorce has regulated the woman’s rights to defend it through court proceedings. Hence, the difficulties mentioned by Carol Smart seem to remain due to the continuing power imbalance between women and men both in the private domain (in a family because of an existing relationship between a husband and a wife or wives) and in the public domain (in the Court room either in the State Court or in Religious Court).

For the purpose of obtaining further understanding about the implementation of the legislation, this paper will explore the experiences of Indonesian women in accessing Family Law and the Religious Legal system. The history itself will reveal the concern of the government (as an authority that issues the legislation and then implements it) in responding to the concerns of women who demand the equality before law in matters concerning marriage and divorce.

II. Method

In 2012-2014, the author conducted research with 14 Indonesian women who had experienced domestic violence and then accessed the State Court and Religious Court to obtain justice. Data was undertaken through indepth interview and analysed qualitatively. Respondents have various educational backgrounds ranging from failing to finish elementary school to university educated. Six persons did not finish their elementary school; four graduated from junior/ high school, and five from university. Most respondents at the time of interviewing were employed, including, for example as a bridal decorator, small economic entrepreneur, park keeper, volunteer at a centre of integrated services, and property entrepreneur. Three were students, and two out of the remaining respondents were retired (namely a retired assistant pharmacist and retired beautician).

III. Theoretical Framework : The History and Concerns of Family Law and Religious Law Dealing with Marriage and Divorce in Indonesia

A. The Marriage Act 1974

Under Dutch rule, the written European civil law, namely the Netherlands Indies Civil Code (*Het Burgerlijk Wetboek voor Nederlands Indie*), was valid for European women as well as oriental Chinese and foreign orientals other than Chinese and ensured a number of rights generally construed as women’s rights, such as the concept of monogamous marriage, minimum age of marriage, and the provisions of recognised grounds for divorce (Saraswati, 2013), however, in some provisions a married woman’s right to equality was hampered by the fact that she could not have the full capacity to own property. On the other hand, there was no regulation for Indonesian indigenous people (who were mostly Muslim) to render Indonesian

native women secure within marriage. Instead Muslim (Shar'iah) law was recognised as applying to such family matters. A Muslim man had the right to issue a talak (verbal, thrice uttered divorce statement by the husband) without notice or regulation. Such a situation made the Muslim women's position within marriage insecure and symbolised women's inequality and vulnerability to divorce as it was very easy for men to obtain. As a consequence, Indonesian women were vulnerable to being divorced or made forced to enter a polygamous arrangement — all often against their will. In addition, despite the provisions within Muslim Law for consent, the less secure and position of daughters economically and their generally lower status made women and girls' also vulnerable to being married by their family to a person not of their choosing and perhaps one unsuited to marriage. Given the circumstances, the Indonesian women's movement urged the government to issue a marriage act in order to guarantee women's or wives' equality with the men or husbands.

The Indonesian government's efforts to regulate the marital practice, especially for Muslims, after the Republic of Indonesia was established,² began with the issuing of a law on the registration of marriage (*nikah*), repudiation (*talak*) and retraction (*rujuk*) in 1946. Nevertheless, the substantial content of the law did not regulate most marriages.³ Therefore, to improve the content of the law and to produce a new national marriage law, in 1950 the government established a commission to compose a Marriage Bill — the *Panitia Penyelidik Peraturan Hukum Perkawinan, Talak dan Rujuk* (abbreviated to *Panitia NTR*, that is *Nikah, Talak, Rujuk* or the Marriage, Repudiation, Retraction (NTR) Commission).⁴

The NTR Commission was instructed to examine all the marriage regulations in force and to work out a process that was suited to the spirit of the modern Independence era and could be applied to the various groups in order to establish greater unification in regard to Indonesian marriage.⁵ However, the Commission's Bill failed to pass; again, the objection raised against it by women was that it favoured polygamy, and repeated efforts and drafts were to be required before an Act would be passed.⁶ Women's organisations had expressed opposition to polygamous marriage, and many had been bitterly disappointed with the failure of the government to pass a comprehensive Marriage Bill, instead passing a regulation (No 90) in 1952 which 'accommodated, even perpetuated' polygamy⁷ (This was compounded by President Soekarno taking a second wife in 1954).⁸

A proposed Bill of Marriage was introduced again in 1958⁹, but it was not until 1973 that the government resubmitted a marriage bill which had been met by a variety of responses.¹⁰ Finally, after a long struggle by women's organisations, the Marriage Act 1974

² Saraswati (2013), *supra* note 3, pp. 2–3.

³ The pluralism of colonial law continued to govern marriage (see *supra* note 13). Thus while the Dutch marriage statutes stipulated minimum marriageable ages, monogamy, consent of both partners and court based divorce, there were no such codified conditions for those of the Islamic faith or for *adat* community members..

⁴ Bedner & van Huis (2010), p. 178.

⁵ Prior to the passing of the *Marriage Act of 1974*, marriage had been regulated through several laws: the customary law (*adat*) for general citizens, the Islamic Law for Muslim citizens, the Christian Indonesian Marriage Ordinance for Christian citizens in Java, Minahasa and Ambon, the Civil Law Code for Citizens of European and Chinese descent, and the Interfaith Marriage Regulation for inter-faith marriages.

⁶ Katz & Katz (1975), p. 660.

⁷ Marlita & Poerwandari (2005), p. 52. See, eg, the response from a spokesperson (Mrs S Kartowijoni) for the Indonesian women's organisation, Perwari, to President Soekarno taking a second wife in 1954: at pp. 50–3, 66–8. See also Nurmila (2009), pp. 50–1.

⁸ The organisation most critical of the move reportedly found itself defunded and later organisations appeared less critical: Marlita & Poerwandari (2005)*supra* note 18, pp. 69–70. See also Nurmila (2009), pp. 50–1.

⁹ Marlita & Poerwandari (2005), p. 70.

¹⁰ Muslim religious opposition said that several provisions were incompatible with the tenets of Islam, particularly in regard to the issue of polygamy. Other areas of contention included interfaith marriage, redefining the status of various relatives and adoption (which are governed differently in Islam to what was proposed in the

(*Undang-Undang Perkawinan*) was finally passed. Under the provisions of this law, all marriages were required to include a religious ceremony and state approved registration (including registration by a Religious Court),¹¹ and all divorces must be determined through a court's decision (again maintaining the role for the Religious Court for Muslim couples).¹² The new law also required the consent of the parties to marriage which targeted the elimination of forced and child marriage practices.¹³ The aim of marriage, according to this legislation, is to establish a happy and prosperous family;¹⁴ and under the Act polygamous marriage is regulated more strictly.¹⁵ However, the feminist concern that the monogamy principle and the quality of gender roles of a husband and a wife would be diminished under the Bill had been abandoned by Islamic groups.¹⁶

Thus, one can say that the Indonesian Marriage Act is monogamous in intent, although polygamous marriage is not prohibited.¹⁷ The Marriage Act allows a husband to engage in a polygamous marriage based on certain circumstance and if he fulfils the requirements set out in law to obtain permission from the Religious Court.¹⁸ The Marriage Act has also reinforced patriarchal and outdated values by making a definition a husband as a 'head of the family' (*kepala keluarga*) and a wife as 'mother of household' (*ibu rumah tangga*).¹⁹ The concept of a husband as the 'head of the family' and a wife as the 'mother of household' is believed by many to be the main cause of subordination women to men within marriage. There is also what many consider an unjust provision regarding women in matters of polygamy since a husband can have more than one wife simply if his wife cannot bear him a child.

The description above has demonstrated the process of the making of the Marriage Act. There were conflict of interest between the women's movement, government and Muslim groups from Islamic organisations (which were dominated by ulamas and most of whose members were male. These groups were also supported by Islamic parties' members in the Parliament at the time).²⁰ The government took Muslim groups' concerns into greatest account as they considered Muslims as comprising the majority of the Indonesian population. As a consequence, the voices from other groups, including women's movements (even Muslim women's groups), remained less heard. This circumstance demonstrated the imbalance of power between the Muslim groups and the women's groups; the power that belonged to women groups was not enough powerful enough to deconstruct the old values and norms, namely patriarchy.

legislation). Indeed the religious sector objected that the entire marriage/divorce area (in particular registration, which attracted the most objections) was not an arena in which the state should be interfering as it was covered by Islamic jurisprudence. Meanwhile, most Indonesian women's organisations supported the original Bill because it was considered sufficient to protect the position of women within marriage.

¹¹ Saraswati (2013), *supra* note 3, p. 2.

¹² *Undang-Undang Perkawinan Nomor 1 Tahun 1974* [Marriage Act No. 1 of 1974] art. 2 (1) (2).

¹³ *Ibid.*, art. 6.

¹⁴ *Ibid.*, art. 1.

¹⁵ Saraswati (2013), *supra* note 3, p. 3.

¹⁶ Munti & Anisah (2005), p. 15.

¹⁷ *Ibid.*

¹⁸ *Undang-Undang Perkawinan Nomor 1 Tahun 1974* [Marriage Act No. 1 of 1974] arts 3(2), 4(1) and general elucidation, and 4(c). A man may receive permission from a court to become a polygamist if and only if: his wife cannot carry out her conjugal duties, or his wife becomes crippled or terminally ill, or his wife cannot give him children. In addition, his present wife or wives must first give him permission, his ability to support all his wives and children must be certain as must be his ability to be fair toward all his wives and children.

¹⁹ O'Shaughnessy (2009), pp. 31–2. As O'Shaughnessy notes, *ibu rumah tangga* is sometimes translated 'housewife' even though the term 'does not exist in Indonesian': at p. 1.

²⁰ Amak (1976), p. 7.

B. The Compilation of Islamic Law

Another piece of legislation issued by the Indonesian government is the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) through an *Instruksi Presiden* [Presidential Instruction] No. 1/1991. The main reason for the passage of the Compilation was to provide guidance for judges after the Religious Court had been acknowledged legally by the government through the Religious Act No. 7 of 1989 and the Judicial Act No. 14 of 1970. The Compilation of Islamic Law is the official legal document for judges in religious courts across Indonesia and an official legal guide in matters of marriage, inheritance and religious donation regulation.²¹

The reasons for the passage of the Compilation were both political and legal. In 1985, the then Indonesian President (Soeharto) supported the process of developing an Islamic jurisprudence in Indonesia. It was believed that the support for and the initiation of the Compilation came from the President whose decision was influenced by the political situation in 1990s. Between the 1980s and 1990s the dynamic rise of Islamic groups had impacted on government popularity. In order to obtain more votes from this section of the population, the government tried to be more accommodating to them — this affected the process of making the Compilation. His interest in being closer to this grouping was echoed in the President funding the process of making the Compilation with his own money.²² The Compilation was completed and then approved by the government in a short time (1987–1991) and legalised through Presidential Instruction in 1991.²³ But there was an additional pressing reason for the passage of the Compilation.

A lack of legal guidance for judges in the Religious Court was a major reason for its passage. The Religious Court existed before Dutch colonisation and the institution persisted among Indonesian natives/*pribumi*. To legalise the Religious Court at a national level, the government issued the Religious Act No. 7 of 1989 and the Judicial Act No. 14 of 1970; consequently, the Religious Court has similar jurisdiction to other courts, such as the State, Military and Administrative Courts. However, after the passage of the Religious Act 1989, there was no guidance for judges for their decision making. The decisions mostly had been made on the basis of various books of the prevailing school of religious thought or *mazhab*. Nevertheless, the matter of lack of consistency remained because judges had their own interpretation of the various *mazhab* books²⁴ which in turn affected their decisions, leading to different decisions from different judges on the same type of cases — this situation had created a degree of ‘social unrest’. Therefore, there was recognition of the need for a *Shari’ah* compilation or specific legislation to support the Religious Court judges in the performance of their duties. This in turn encouraged the government to establish a committee to formulate the substance of the Compilation. To determine the substance of the Compilation, the Committee undertook comparative studies involving several Islamic countries, research on different Islamic legal *mazhab* and Indonesian jurisprudence, and also interviewed Islamic leaders in several Indonesian regions. Therefore, there was a belief that the Compilation would be accepted by Indonesian Muslims because the content was formulated locally and adjusted to Indonesian culture.

²¹ Saraswati (2013), *supra* note 3, p. 3.

²² Panji Masyarakat Nomor 502 tahun XXVII, 1 Mei 1986, in Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, 1992 as cited by Munti & Anisah (2005), *supra* note 27, p. 15.

²³ See Nuruddin & Tarigan (2004); Nurlaelawati, & Rahim (2012), pp. 63–4; see also Cammack & Feener (2012), p. 43.

²⁴ The government encouraged judges in the Religious Court to use 13 *mazhab* books as guidance, namely: *al-bajuri*, *fathu a-Mu’in*, *Syarqowi ‘ala at-Tahrir*, *Qolyubi/Mahalli*, *fath al-Wahhab*, *Tuhfah*, *Targhib al-Mustag*, *Qawanin Syar’iyyah li as-Sayyid bin Yahya*, *Qawanin Syar’iyyah li as-Sayyid Sadaqah Dahlan*, *Syamsuri bi al-Faraidl*, *Bugyah al-Mustarsyidin*, *al-Fiqh ‘ala Mazahib al-Arba’ah*, and *Mugni al-Muhtaj*. See Munti & Anisah (2005), *supra* note 27, 11–15.

Nevertheless, as with the Marriage Law, a number of Articles in the Compilation are believed by Indonesian Muslim feminists to marginalise women.²⁵ The feminists argue that the Compilation confirms and perpetuates inequality and inequity between men and women within marriage matters such as guardianship, marriage witnesses, *nusyuz* (women's disobedience in marriage), polygamy and in its delineation of a husband's and wife's rights and obligations.²⁶ It is believed that the content of the Compilation continued to facilitate the marginalisation of women, at least in part because very few women were involved in the process of its creation.²⁷

The process of the making of Compilation of Islamic Law was not good as that involved in creating the Marriage Act. The process of making the Compilation was heavily influenced by political interest of the person in authority (the president) and by the interest of the state in terms of legal matters (which was represented by judges in Religious Court) — rather than by the interests of the women's movement. Although the Compilation was made through comparative studies of Islamic law as it applied in Egypt, Tunisia and Morocco, it was noted that the Committee members for this project consisted of 15 men and one woman. In the hearing process in the Parliament, just three of the 44 members were women. Not one woman had been involved as a researcher to interview *ulamas*, and while 182 (male) *ulamas*/religious scholars) had been interviewed, only four women activists/scholars in religious matters had been interviewed.²⁸ The belief that the Compilation would be accepted by Indonesian Muslims because the content was formulated locally and adjusted to Indonesian culture is questionable because the Compilation seemed not accommodate the women's voices of the region. It can be traced from the provisions in the Compilation which continue to set men in a position superior to women (see the discussions on 'the responsibility and rights' below).

C. The Method: Procedures for Marriage and Divorce

The Marriage Act 1974 is the main act for regulating marriage for persons of all religions in Indonesia. There are two steps that should be undertaken to make the marriage valid; first, the procedure is grounded in the rules of the person's religion or their faith; in addition, every marriage must be registered based on the prevailing legislation.²⁹ In principle, the mechanism for a valid marriage is the same for all citizens: first, the marriage must be undertaken on the basis of the citizen's religion and beliefs³⁰; and, then, it must be registered. However, the registration offices for Muslims and non-Muslims (Protestant, Catholic, Buddhist, Hindu, Confucian) differ from each other due to each religion having its own institution to celebrate marriage. For instance, Muslim brides must use the accepted Islamic marriage procedure by going to the registrar of marriage; Catholic or other recognised Christian brides must utilise the accepted Catholic/Christian marriage procedure by going to the relevant church and being married by clergy; and persons of other recognised religions (such as Buddhism, Hinduism, and Confucianism) must be married in accordance with their

²⁵ *Ibid.*

²⁶ Mulia (2010), p. 116.

²⁷ See Munti & Anisah (2005), *supra* note 27, p. 24.

²⁸ *Ibid.*

²⁹ *Undang-Undang Perkawinan Nomor 1 Tahun 1974* [Marriage Act No. 1 of 1974] arts 1, 2.

³⁰ Beliefs as a basis are recognised in the provisions of this Act. In fact, there are difficulties in registering the marriage between a couple who hold different religious beliefs and/or are of religions which are not among the six faiths recognised by Indonesia under Pancasila, i.e. Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism. See Bureau of Democracy, Human Rights and Labour (2001). See Saraswati (2014), p. 243. Judaism is not recognised, nor are Jainism, Sikhism, animism, or atheism and agnosticism so those wishing to marry may ostensibly 'adopt' another faith for that purpose or for registration as a citizen.

rites and traditions.³¹ Then, a religious-based marriage is registered with the state which has a different office based on whether the faith is Muslim or non-Muslim. An Islamic marriage is to be registered with the Office of Religious Affairs, while a marriage conducted in accordance with Catholic or other Christian (Protestant), Buddhist, Hindu, or Confucian rite is registered at a civil registry office.

III. The Responsibilities and Rights of Husband and Wife during Marriage and After the Marriage Breakdown

A. The Responsibilities and Rights of Husband and Wife during Marriage

The Marriage Act and its implementing regulation (*Peraturan Pemerintah Nomor 9 Tahun 1975* (PP 9/75) [Government Regulation No. 9 of 1975] and PP 10/83 dealing with the issue of marriage and divorce for civil servants) apply to everyone regardless of their religion, and the Compilation of Islamic Law applies to Indonesian Muslims. The legislation regulates women's rights in a marriage relationship.

Table 1. Responsibilities and Rights of a Husband and a Wife in a Marriage Relationship

No	Responsibilities and Rights	Marriage Act 1974	PP 10/83	Compilation of Islamic Law
1	A husband and a wife have a responsibility to maintain family harmony as the family is the basis of the structure of community.	Art. 30	Consideration, point (b)	Art. 77(1)
2	A husband and a wife are equal to each other both in the household or social life.	Art. 31(1)	Amendment of the Marriage Act	Art. 79(2)
3	A husband and a wife have the right to conduct legal actions.	Art. 31(2)	Amendment of the Marriage Act	Art. 79(3)
4	A husband and a wife must respect, love, be faithful to, and support each other.	Art. 33	Amendment of the Marriage Act	Art. 77(2)
5	A husband is a head of household and has responsibilities to protect his wife and fulfil the needs of family members based on his capability.	Arts 31(3), 34(1)	Amendment of the Marriage Act	Arts 79(1), 80, 81, 83
6	A wife is a housewife and her responsibility is to organise household affairs as well as possible.	Arts 31(3), 34(2)	Amendment of the Marriage Act	Arts 79(1), 83, 84
7	If a husband or a wife neglects his/her responsibilities, it can be used as the reason to sue the party who has abandoned his/her responsibility	Art. 34(3)	Amendment of the Marriage Act	Art. 77(5)
8	A husband and a wife have rights to any property which is obtained during the marriage. Meanwhile, the property gained before marriage will be under the control of the party who brought that property to the marriage.	Art. 35	Amendment of the Marriage Act	Arts 85–97

Source: Rika Saraswati (2014)

Table 1 shows that the Marriage Act, PP 10/83 and the Compilation of Islamic Law regulate the obligations of a husband and a wife to maintain family harmony as the family is

³¹ See Saraswati (2014), *supra* note 45, pp. 243–4.

seen as the basis of the community in general. This obligation has been strongly emphasised, particularly in regard to civil servants because as civil servants persons are expected (by the government) to be an example to others. Therefore, they must demonstrate good behaviour because their individual and familial life are controlled not only by the society but also by the institution or state.³²

The legislation insists upon equality in the relationship between a husband and a wife in the household, social life and legal matters; however, the gender role is the main division of roles between a husband (who is characterised as a 'head of household' and a wife (who is characterised as a 'housewife' or 'mother of household').³³ This issue is regulated in detail in the Compilation of Islamic Law. It has set a husband as simultaneously a 'guide', 'protector', 'teacher' and 'provider' to his wife, and through this role he has responsibilities for his wife/wives, such as giving her/them a living (sufficient for daily life, health and household affairs), *kiswah* (clothes), and providing a residence. However, these responsibilities will disappear if his wife or wives are guilty of *nusyuz* (disobedience). The Compilation states that the main obligation of a woman as a wife is to serve her husband devotedly, and manage and organise the household affairs as well as possible. If she does not fulfil her main obligation, she is considered to be guilty of *nusyuz*; as a consequence, she will lose her rights as wife.

B. The Responsibilities and Rights of Husband and Wife after the Marriage Breakdown

Another provision of the 1974 law involves divorce. Under the Marriage Act 1974, men as well as women must submit a petition to the court for a divorce. Articles 39(1)(2) and 40 of the Marriage Act 1974 state that divorce will be undertaken before the court after the court cannot reconcile both parties, and divorce must be undertaken based on the convincing reason or 'sufficient reasons' that the marriage relationship between a husband and a wife cannot be sustained. The 'sufficient reasons' for divorce are: adultery; compulsive drinking, drug taking, or gambling; desertion for two consecutive years; the spouse having a jail sentence of five years; endangerment of one spouse by the other; disease or handicap which prevent the carrying out of marital duties; and continuous arguments caused by irreconcilable differences.³⁴ Then, if judges are convinced by the one or several grounds of divorce that are presented by the applicant, they will grant the divorce. Based on the Marriage Act, both a wife and a husband can present as a litigant before the court.³⁵

With regard to the results of a divorce, the 1974 law contains provisions regarding spousal maintenance, custody and child support, and division of marital property. Article 41(c) of the Marriage Act 1974 states that the court can make an order to the ex-husband to provide maintenance to his ex-wife (spousal maintenance) only if the wife demands it and it is declared in her lawsuit. However, this Article does not explore further about the nature of the maintenance; as result, it affects women's rights when they sue their husband for maintenance. Maintenance in the Marriage Act is regulated differently from Compilation of Islamic Law. The relevant legislation is the *Peraturan Pemerintah Pelaksanaan Undang-Undang Perkawinan 1974 Nomor 10 Tahun 1983* (PP 10/1983) [Implementing Regulation of Marriage Act 1974 No. 10 of 1983] on Government Regulations on Permission for Marriage and Divorce for Civil Servants.³⁶

³² Suryakusuma (2009), p. 48. See Saraswati (2014), *supra* note 45, p. 249.

³³ Saraswati (2014), *supra* note 45, pp. 249, 254.

³⁴ *Peraturan Pemerintah tentang Pelaksanaan Undang-Undang Perkawinan Nomor 9 Tahun 1975* [Implementing Regulation on the Marriage Act 1974 No. 9 of 1975] art. 39.

³⁵ *Undang-Undang Perkawinan Nomor 1 Tahun 1974* [Marriage Act No. 1 of 1974] art. 40.

³⁶ Implementing Regulation No. 10 of 1983 provisions prohibit the practice of polygamy and it also placed heavy restrictions upon divorce by civil servants, who risk dismissal if they fail to comply with the regulations. The civil servant becomes the model of good citizen in society and in the organisation of their family lives. Therefore, a civil servant is forbidden to live in a *de facto* relationship. If a civil servant wants to file for

1. Compilation of Islamic Law

Articles 114 and 115 of the Compilation of Islamic Law state that a dissolution of marriage can be undertaken on the basis of *talak* (where the litigant is a husband) and *gugatan cerai*/divorce (where the litigant is a wife). The application for divorce — either *talak* or *gugat cerai* — must be delivered to the religious court.³⁷ There are eight grounds for divorce according to Article 116 of the Compilation of Islamic Law: a) One of the parties commits adultery or is an alcoholic, is addicted to drugs, a gambler and/or has other vices which are difficult to cure; b) One party leaves the other party for two consecutive years without the consent of other party and without legal justification or because of other things beyond their ability; c) One party gets a five-year jail sentence or punishment after the marriage has been entered into; d) Either party is cruel or mistreats the other, endangering the life of the other party; e) One party has disability or disease that renders them unable fulfil their obligations as a husband or wife; f) Between husband and wife there are persistent disputes and quarrels, and no hope of peace survives in the household; g) there is a violation of a *taklik-talak* (premarital agreement); h) the other party becomes an apostate (i.e. renounces Islam — whether born to a Muslim family or a revert), converts to another faith or becomes an atheist which causes instability in the household.

The Compilation of Islamic Law provides two ways of divorce: *talak* and *gugat cerai*. *Talak* is divorce initiated by a husband; meanwhile, *gugat cerai* is a divorce with a wife as the litigant. The kind of divorce utilised will affect the woman's rights. There is a difference impact on divorce which is filed by a husband as litigant and that filed by a wife as litigant.

Article 149 states that *talak* (an Arabic word meaning 'to release' or 'to divorce', to untie the matrimonial knot by articulating a word denoting divorce) has consequences for the ex-husband has to: (a) provide [a gift or present] either money or goods to his ex-wife only if his ex-wife does not *qobla al dukul* [does not have sexual intercourse with the husband]; provide a living, *maskan* [a place for living] and *kiswah* [clothes] to his ex-wife during *iddah* [period of time that must be passed through before she is able to remarry] only if his ex-wife has been subject to *talak ba'in* [*talak* which had been undertaken by the husband three times] or not *nusyuz* [disobedient] and she is not pregnant; pay the indebt *mahar* [a gift given by the bride-groom to his bride upon marriage]; provide the living for his children who are aged under 20 years.

Article 156 states that a marriage that ends due to a divorce initiated by a wife [*gugat cerai*] brings certain consequences: (a) children under 12 [*mumayyiz*] are entitled to have mother's guardianship, unless the mother is dead, in which circumstances she will then be replaced by: women from the upper-line of the mother, father, women from the upper-line of the father; (b) children who have already completed their *mumayyiz* are entitled to choose a guardian; (c) *hak haddanah* [a guardian right] can be removed if the guardianship is considered not convincing, the removal based on application to the Religious Court; (d) the expenses of guardianship are one of the father's responsibilities until the children reach 20 years of age; (e) the court will decide the expenses for guardianship if there is conflict on this matter, and the decision will be determined by considering situation as per paragraphs (a), (b) and (d); (f) the court will consider the responsibility of the father to provide maintenance for children who are not under his guardianship.

The description above has demonstrated that in the Compilation of Islamic Law, a

divorce, they have to ask permission from their supervisors, who are legally bound to attempt to reconcile the couple. However, the civil servants' Marriage Law also contained financial disincentives designed to discourage women from filing for divorce. See also Saraswati (2013), *supra* note 3, pp. 15–16.

³⁷See Saraswati (2014), *supra* note 42, pp. 251–3.

woman will obtain maintenance if her husband initiates the divorce; however, if she initiates the divorce, she will not obtain the maintenance as a divorced woman she would otherwise receive. Articles 149 and 156 of the Compilation of Islamic Law govern this. Article 149 clearly states in detail the responsibilities of the husband who utters *talak* / divorces his wife. When one turns to Article 156 with its title that mentions ‘the consequence of *perceraian*/divorce’, there is no statement on the responsibility of the husband to the ex-wife; it only mentions the responsibility of the father to the children (see Article 156(f) mentioned above).

IV. Problems of Rights and the Experience of Indonesian Women as Litigants in Divorce Cases

On the basic problem of exercising one’s rights (particularly women’s rights), this section explores the experiences of Indonesian women who have filed for divorce. In 2011 and 2012, the author conducted research with 14 Indonesian women who had experienced domestic violence and then accessed the State Court and Religious Court to obtain justice. Seven women initiated legal action (becoming litigants), three remained non-litigants, and the rest have had decided to continue the marriage in spite of abusive circumstances.³⁸ Being litigants has shown their readiness to leave the abusive marital relationship, although separation from the partner was and still is seen as the ultimate way. Being litigants was not their choice actually, but the circumstances within the family had forced them to file for divorce after access to the criminal justice system had been made and did not meet their expectations. Their decision to file for divorce has shown the women’s active response and they are not seen merely as helpless, dependent and passive persons.³⁹

The research demonstrated that women becoming litigants, particularly in the Religious Court in Indonesia, resulted in substantial financial losses for them. Successful women litigants had no right to ask for a living to be provided by their former husband after the divorce. On the other hand, being a non litigant also emerged a source of a woman’s suffering when a husband did not ‘seriously’ wish to divorce his wife. The reason for a husband refusing to pledge *talak* varied. The most common reason was a husband’s refusal to pay spousal maintenance due to financial issues. Another prevalent motive of the husband was his desire to ‘hang onto’ marriage status in order to punish the wife or ensure that she remained in a dependent status rather than from a genuine desire for reconciliation. Such an action taken by a husband was usually his strategy not only to avoid his responsibility as a litigant to provide maintenance which has been regulated by the Compilation of Islamic law, but also as an action of ‘revenge’ against his wife.⁴⁰

Meanwhile, for non-Muslim applicants in the State Court, the right to a living/maintenance after divorce (as regulated by the Marriage Act 1974) is not automatically granted by judges if this is not declared and demanded explicitly in the law suit. A study on the experience of women as non-litigants has demonstrated that their demands for the living / maintenance and shared property diminished where the demands were not stated explicitly. Judges (whether in Religious Court and State Court) hold the norms and rules that a judge will not grant the litigant’s demands further than stated in the law suit. There is also a misunderstanding about a divorced woman’s rights in the Religious Court that had led women to a belief that they would obtain the same rights.⁴¹

³⁸ Saraswati (2014), *supra* note 45, pp. 73–5.

³⁹ Rhodes & McKenzie (1998), p. 391–406; see also Peled, Eisikovits, Enosh, & Winstok (2000), pp. 14–16; see also Hollenshead, Dai, Ragsdale, Massey, & Scott (2006), p. 272; see Bally (2010), pp. 2298–9.

⁴⁰ *Ibid.*, p. 13.

⁴¹ *Ibid.*

Conclusion

The difficulty faced by women in obtaining their rights as litigants was mainly caused by legislation discriminatory to women. There are inconsistencies between the articles in the Marriage Act 1974 which regulated the same equality between a husband and a wife within marriage and social life, but in fact it remained create discrimination against women. These inconsistencies have revealed the mindset and the concern of the legislator in regard to the issues of equality between women and men, and the tensions in satisfying the demands of both and of reconciling religious and secular rights and women's needs and aspirations. This includes their right to divorce (particularly in circumstances of violence) and their need for maintenance for themselves (and their children), this latter being sacrificed if the woman is a litigant. This acts as a disincentive for divorce and keeps women and their children in violent unhealthy relationships that damage both them and their children. Through an examination of the history of the legislation and in particular its implementation to date, it is manifestly clear that in its present form and implementation, there exists discrimination against women.

References

- Amak, F.Z (1976) *Proses Undang-Undang Perkawinan* [Process of the Marriage Act] (Bandung: PT al Ma'arif).
- Bally, Andrew R. (2010) 'Leaving Abusive Relationships: Constructions of Self and Situation by Abused Women.' 25(12) *Journal of Interpersonal Violence* 2297–315.
- Bedner, Adriaan, & Stijn van Huis (2010) "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism." 6(2) *Utrecht Law Review*. 175–191.
- Blackburn, Susan (2001) "Gender Relations in Indonesia: What Women Want," in G. Lloyd & S. Smith ,eds, *Indonesia Today: Challenges of History*, Lanham:Rowman & Littlefield, 270–82.
- Bureau of Democracy, Human Rights and Labour (2001) "Indonesia" in Bureau of Democracy, Human Rights and Labor, *2001 International Religious Freedom Report*. US Department of State <http://www.state.gov/j/drl/rls/irf/2001/5686.htm>.
- Butt, Simon (2010a) "Islam, the State and the Constitutional Court in Indonesia," Legal Studies Research Paper No. 10/70 July 2010.
- Butt, Simon (2010b) "Islam, the State, and Constitutional Court." 19(2) *Pacific Rim Law & Policy Journal*. 279–301.
- Cammack Mark E, & R. Michael Feener (2012) "The Islamic Legal System in Indonesia." 21(1) *Pacific Rim Law & Policy Journal* 13–42.
- Compilation of Islamic Law
- Hollenshead, J. H., Y. Dai, M. K. Ragsdale, E. Massey, & R. Scott (2006) "Relationship

between Two Types of Help Seeking Behaviour in Domestic Violence Victims.” 21 *Journal of Family Violence*. 271–9.

Katz, June S., & Ronald S. Katz (1975) “The New Indonesian Marriage Law: A Mirror of Indonesia’s Political, Cultural, and Legal Systems.” 23 *American Journal of Comparative Law* 653–681.

Locher-Scholten, Elsbeth (2000) *Women and the Colonial State: Essays on Gender and Modernity in the Netherlands Indies 1900–1942*, Amsterdam: Amsterdam University Press.

Marlita, Tita, & Kristi Poerwandari (2005) “Indonesian Women’s Movement in the Period of 1928-1965,” in K. Poerwandari, ed., *Indonesian Women in a Changing Society*, Seoul: Ewha Women University Press, 41–74.

Martyn, Elizabeth (2005) “Confronting the State: The Fight for a Marriage Law’ in L. Edwards, ed., *The Women’s Movement in Post-Colonial Indonesia: Gender and Nation in a New Democracy*, London: Routledge Curzon, 122.

Mulia, Siti Musdah (2010) ‘Toward Just Marital Law: Empowering Indonesian Women’ in R. de Silava-de Alwis, ed., *Women Leading Change: A Collection of Essays from Women Leaders Advancing Justice in the Muslim World*, Wellesley College: Wellesley Centers for Women, 109–46.

Munti, Ratna Batara, & Hindun Anisah (2005) *Posisi Perempuan dalam Hukum Islam di Indonesia* [Women’s Position in Islamic Law in Indonesia] (Jakarta: LBH-APIK).

Nakamura, Hisako (2006), *Conditional Divorce in Indonesia*, Occasional Publication 7, pp. 5–20, esp. pp. 9–10. <http://ilsp.law.harvard.edu/wp-content/uploads/2014/08/nakamura2.pdf>.

Nurlaelawati, Euis (2010) *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practices of the Indonesian Religious Court*, Amsterdam: Amsterdam University Press.

Nurlaelawati, Euis (2013) “Shari’a-based Laws: The Legal Position of Women and Children in Indonesia,” in *Regime Change, Democracy, and Islam: The Case of Indonesia* (A Final Report), Jakarta: Islam Research Programme, 11–81.

Nurlaelawati, Euis, & Abdurrahman Rahim (2012) “The Training, Appointment, and Supervision of Islamic Judges in Indonesia.” 21(1) *Pacific Rim Law & Policy Journal*. 43–64.

Nurmila, Nina (2009) *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia*, London/New York: Routledge.

Nuruddin, Amiur, & Azhari Akmal Tarigan (2004) *Hukum Perdata Islam di Indonesia: Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No 1/1974 sampai KHI* [Islamic Civil Law in Indonesia: Critical Study on the Development of Islamic Law from Fiqh, the Marriage Act 1974 to the Compilation of Islamic Law], Jakarta: Kencana.

O’Shaughnessy, Kate (2009) *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law*, New York: Routledge.

Parker, Lyn, Irma Riyani, & Brooke Nolan (2016) "The Stigmatisation of Widows and Divorcees (*Janda*) in Indonesia, and the Possibilities for Agency." 44(128) *Indonesia and the Malay World*. 27–46.

Parker, Lyn, & Helen Creese (2016) "The Stigmatisation of Widows and Divorcees (*Janda*) in Indonesia." 44(128) *Indonesia and the Malay World*. 84–103.

Peled, Einat, Zvi Eisikovits, Guy Enosh, & Zeev Winstok (2000), 'Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model.' 45(1) *Social Work* 9–25.

Rhodes, Nancy R., & Eva Baranoff McKenzie (1998) 'Why Do Battered Women Stay?: Three Decades of Research.' 3(4) *Aggression & Violent Behaviour* 391–406.

Robinson, Kathryn (2008) *Gender, Islam and Democracy in Indonesia*, New York/London: Routledge.

Saraswati, Rika (2013) "Justice and the Identities of Women: The Case of Indonesian Women Victims of Domestic Violence Who Have Access to Family Court" 1 *Forum on Public Policy: A Journal of the Oxford Round Table*. 1–21.

Saraswati, Rika (2014) "Public and Private Dichotomy in the Legal System: Indonesian Women's Access to Justice when Dealing with Domestic Violence." PhD diss., Faculty of Law, University of Wollongong.

Saraswati, Rika, "'Breaking the Silence': The Way in which Indonesian Women Experiencing Nonphysical Violence within the Family Access the Legal System" Presented' the Asian Law & Society Association (ALSA) Conference, Law & Society in Asia : Defining & Advancing the Field, National University of Singapore, 22–23 September 2016.

Smart, Carol (1989) *Feminism and the Power of Law*, London: Routledge..

Suryakusuma, Julia I. (2009) "The State and Sexuality in New Order Indonesia" in L. Edwards & M. Roces, eds, *Women in Asia: Critical Concepts in Asian Studies* vol. IV, London: Routledge 48.

Undang-Undang Perkawinan Nomor 1 Tahun 1974 [Marriage Act No. 1 of 1974].

Peraturan Pemerintah tentang Pelaksanaan Undang-Undang Perkawinan Nomor 9 Tahun 1975 [Implementing Regulation on the Marriage Act 1974 No. 9 of 1975] art. 39.

Peraturan Pemerintah Republik Indonesia Nomor 10 Tahun 1981 tentang Izin Perkawinan dan Perceraian Bagi Pegawai Negeri Sipil (Implementing Regulation of the Marriage Act 1974 on Marriage and Divorce Permit for Civil Servants No. 10 of 1981).

Stijn van Huis (2011) "Akses terhadap Hak-hak Pascaperceraian bagi Perempuan Bercerai di Cianjur," in W. Berenscho, (ed., *Akses terhadap Keadilan: Perjuangan Masyarakat Miskin dan Kurang Beruntung untuk Menuntut Hak di Indonesia*, Jakarta: HuMA, 233–53.